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No. 94-1819

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IN THE

Supreme Court of the United States

October Term, 1994

TODD FOX, EDWARD R. DETWEILER, STEPHANIE VAIANO, JAMES B. CULLEN, CHRISTINE MARIE ODELL, STEVEN GAWLEY, DANIEL ALTMAN, PHILIP JAY BOTWINIK, JEFFREY S. ZELLAN, JACLYN BERNSTEIN, GLEN MAGPANTAY, WILLIAM WEITZ, COREY ANTHONY, DIEGO MUNOZ, EDWARD FAGAN, BAYCAN FIDELI, JODIE GREEN and JEFFREY LUKS,

Petitioners,

against

THE BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK, and CLIFTON R. WHARTON, JR., individually and as Chancellor of the Board of Trustees, and THE STATE UNIVERSITY OF NEW YORK COLLEGE AT CORTLAND, and JAMES M. CLARK, individually and as President of the College at Cortland, and THE STATE UNIVERSITY OF NEW YORK AT BINGHAMTON, and CLIFFORD D. CLARK, individually and as President of the State University of New York at Binghamton, and THE STATE UNIVERSITY OF NEW YORK AT ALBANY, and VINCENT O'LEARY, individually and as President of the State University of New York at Albany, and THE STATE UNIVERSITY OF NEW YORK COLLEGE OF ARTS AND SCIENCES AT POTSDAM, and HUMPHREY TOMKIN, individually and as President of the College of Arts and Sciences at Potsdam,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Counterstatement of Questions Presented

1. Whether this Court should grant certiorari to review a decision of the United States Court of Appeals for the Second Circuit, holding that because plaintiffs, former students at the State University of New York ("SUNY") who challenged a SUNY regulation as an infringement of their First Amendment rights as students, are no longer affiliated with SUNY, their case is moot, when the decision below was based on the well-established principles that the mootness doctrine is constitutional in nature, that a case's mootness deprives a federal court of subject matter jurisdiction, and that students who challenge a regulation of an academic institution with which they are no longer affiliated lack a personal stake in the outcome of the litigation, which is therefore moot.

2. Whether this Court should grant certiorari to review a decision of the United States Court of Appeals for the Second Circuit, which affirmed the district court's dismissal of this action on the ground of mootness, when the plaintiffs, former students challenging a regulation of a university with which they have had no affiliation for more than six years, have no continuing stake in the outcome of the case, which has not yet been resolved on its merits and has remained before the federal courts solely because plaintiffs' counsel are seeking attorney's fees pursuant to 42 USC § 1988.

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No. 94-1819

IN THE

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TODD FOX, EDWARD R. DETWEILER, STEPHANIE VAIANO, JAMES B. CULLEN, CHRISTINE MARIE ODELL, STEVEN GAWLEY, DANIEL ALTMAN, PHILIP JAY BOTWINIK, JEFFREY S. ZELLAN, JACLYN BERNSTEIN, GLEN MAGPANTAY, WILLIAM WEITZ, COREY ANTHONY, DIEGO MUNOZ, EDWARD FAGAN, BAYCAN FIDELI, JODIE GREEN and JEFFREY LUKS,

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Statement of the Case

Resolution 66-156 of the Board of Trustees of the State University of New York ("SUNY") prohibits the "operat[ion]" of "private commercial enterprises" on SUNY campuses (206).[1] American Future Systems, Inc. ("AFS") is a Pennsylvania corporation engaged in selling cookware, china and tableware to college students through group demonstrations of its products in college and university dormitory rooms (258). In October 1982, AFS representative Kathy Rapp ("Rapp"), in the process of consummating sales after a dormitory-room demonstration of AFS products at SUNY-Cortland, was asked to leave by campus authorities. When she refused, she was arrested (218-19). Subsequently, Todd Fox ("Fox"), a SUNY-Cortland student, sought and was denied permission to host an AFS demonstration (39-40).

On December 2, 1982, AFS, Rapp and Fox commenced this action pursuant to 42 USC § 1983 in the United States District

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[1]Parenthetical citations are to the Joint Appendix submitted by the parties in the court below.

Court for the Northern District of New York, naming as defendants SUNY-Cortland, the SUNY Board of Trustees, and five individuals affiliated with SUNY-Cortland (20, 22-23). Plaintiffs sought declaratory and injunctive relief and contended, *inter alia,* that they had been deprived of their "right to freedom of speech" under the First Amendment (29-30). On June 3, 1983, the District Court (McCurn, J.) preliminarily enjoined SUNY from enforcing Resolution 66-156 by barring group product demonstrations in dormitory rooms. *American Future Systems, Inc. v State University of New York College at Cortland,* 565 F Supp 754 (NDNY 1983) (174).

On August 28, 1984, plaintiffs filed an amended complaint, naming as additional plaintiffs certain students at SUNY-Cortland and SUNY-Albany, and adding as defendants SUNY-Potsdam, SUNY-Albany, SUNY-Binghamton and the Presidents of those three institutions (46-49). Rapp thereafter withdrew as a plaintiff. On December 23, 1985, plaintiffs moved pursuant to Fed R Civ P 15 and 21 to amend their complaint again, now seeking to add certain plaintiffs, drop certain defendants, and add and withdraw allegations (77). In an affidavit accompanying the motion, plaintiffs' counsel explained that he proposed to add students from SUNY-Cortland and SUNY-Albany "as student plaintiffs so that they may preserve and continue to litigate the student-related issues already raised in this action against" those institutions (79, 80). The District Court granted plaintiffs' motion to amend the complaint on January 7, 1986.

The case was tried without a jury during September and October, 1986. On December 12, 1986, the District Court dissolved its preliminary injunction and upheld SUNY's regulation, applying a "public forum" analysis to the case and treating the regulation as a valid effort to preserve public property in the face of an incompatible use. *Fox v Board of*

Trustees of the State University of New York, 649 F Supp 1393 (NDNY 1986) (84). The student plaintiffs only, and not AFS, appealed to the United States Court of Appeals for the Second Circuit. On March 11, 1988, the Second Circuit, in a 2-1 decision, reversed the decision of the District Court and remanded the case to that court, rejecting the public forum analysis and instead analyzing the SUNY regulation as a government restriction on commercial speech. 841 F2d 1207 (2d Cir 1988) (106). According to the Second Circuit, such a restriction was constitutionally required to be the "least restrictive means" of achieving SUNY's purpose (110-113).

On October 3, 1988, this Court granted defendants' petition for a writ of certiorari. 488 US 15 (1988). An inquiry by SUNY's counsel at the time the petition was granted revealed that at least one student plaintiff was currently registered at SUNY (584). On the same day certiorari was granted, the District Court issued a decision on remand, invalidating Resolution 66-156 as "not the least restrictive means for meeting the proffered state interests" (175, 183-84). 695 F Supp 1409 (NDNY 1988). Defendants then moved in the District Court pursuant to Fed R Civ P 52 and 59 to amend the District Court's findings of fact and its judgment. On November 23, 1988, the District Court issued an order staying all proceedings until after this Court had acted.

On June 29, 1989, this Court reversed the Second Circuit's judgment and remanded the case for further proceedings. 492 US 490 (1989) (76a).[2] The Court found that its prior decisions upholding government regulation of commercial speech could not "be reconciled with a requirement of least

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[2]Parenthetical citations followed by "a" are to the Appendix to the Petition for Writ of Certiorari.

restrictive means" (86a). The Court remanded the case to the Second Circuit for determination of the validity of the SUNY regulation both as applied and in terms of overbreadth (418). On September 25, 1989, the Second Circuit in turn remanded the case to the District Court (422).

At the time of this remand to the District Court, counsel for defendants learned that none of the plaintiffs was a SUNY student any longer and thus that the case had become moot (584-85). Defendants' brief on remand called this fact to the District Court's attention. Plaintiffs' brief on this subject contained a footnote "request[ing] leave to amend their complaint to join as plaintiffs" four students who were currently enrolled at SUNY. On May 24, 1991, the District Court issued a memorandum-decision and order concluding that the case was moot and that it did not fit within the exception to the mootness doctrine for matters capable of repetition but evading review, but granting plaintiffs leave to amend their complaint pursuant to Fed R Civ P 15(a). 764 F Supp 747 (NDNY 1991) (54a). Plaintiffs accordingly filed an amended complaint naming current SUNY students as plaintiffs (454).

Defendants moved in the District Court for reconsideration of the court's order permitting amendment of the complaint. On May 7, 1993, the District Court issued an opinion reaffirming its conclusion that the case was moot, finding that its 1991 decision was otherwise "in clear error," rejecting plaintiffs' suggestion that the complaint could be amended pursuant to either Fed R Civ P 15 or 21 to add new plaintiffs, and dismissing the complaint. 148 FRD 474 (NDNY 1993) (23a). With respect to Rule 21, which deals with nonjoinder and misjoinder, the District Court opined that the rule was "not enacted as a means for a party to avoid dismissal on mootness grounds," for "[i]f that were so, no case would ever become moot," "thus rendering the

mootness doctrine a legal fiction" (43a-47a). As to Rule 15, the District Court overturned its prior grant of leave to amend, noting that the rule "allows only a 'party' to amend 'the party's pleading,' " but that "the original plaintiffs are no longer 'parties' to this action because the case has become moot as to them," such that "the court lacks jurisdiction" and is "without power to act" (49a-50a). Plaintiffs' motion for reconsideration of the District Court's entry of judgment for defendants was denied on June 23, 1993 (588).

Plaintiffs then appealed to the Second Circuit, which on December 9, 1994 issued a decision affirming the District Court's judgment. 42 F3d 135 (2d Cir 1994) (6a). The court first rejected plaintiffs' argument that defendants had "waived" their right to assert a defense based on mootness. As the Second Circuit noted, this "argument ignores the jurisdictional nature of the Article III requirement that federal courts adjudicate only 'Cases' and 'Controversies' " (14a). When a case becomes moot, the court below observed, federal courts lack subject matter jurisdiction over the action, and "[d]efects in subject matter jurisdiction cannot be waived and may be raised at any time during the proceedings" (15a). Because the plaintiffs had departed SUNY, "[t]he relief sought in the Complaint could provide no legally cognizable benefits to Plaintiffs," "th[e] case was moot," and the District Court lacked subject matter jurisdiction (16a).

The Second Circuit next considered and rejected the several arguments by which plaintiffs sought to circumvent the mootness of their case. The failure of the complaint to request nominal damages or anything other than declaratory and injunctive relief meant that plaintiffs' newly-asserted claim for nominal damages did not "suffice to avoid mootness when [their] claims for injunctive and declaratory relief have become

moot" (18a-19a). Nor, said the court below, could plaintiffs keep their moribund case alive by contending that they are "litigating in a representational capacity" on behalf of other SUNY students (19a). They had neither conducted the case as a class action nor otherwise "explicitly asserted [in the pleadings] that [they] were acting in a representative capacity on behalf of themselves and other students similarly situated" (19a-20a).

The case likewise did not fall within "the 'capable of repetition, yet evading review' exception to mootness" (20a). The case, said the Second Circuit, did not typically evade review because "there is no reason to believe that the issue presented by this case could not be litigated in the four-year span of a standard undergraduate education," especially "[n]ow that the Supreme Court has defined the applicable rule" to be applied on the merits (20a). Nor did the court below detect a "reasonable expectation" that the case would repeat itself with the present plaintiffs. Although several plaintiffs, none of whom has been affiliated with SUNY since 1988, had sought to supplement the record on appeal with affidavits suggesting that they might return to SUNY "'within the next few years,'" and their motion was denied, in any event this "bare statement of intention [was] insufficient to escape mootness," particularly in view of the fact that "the expressed intention to return to the SUNY system is not solely within plaintiffs' power to accomplish" (21a-22a).[3]

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[3]Because plaintiffs allude (Petition, pp 6, 19) to "evidence" suggesting that some of them may wish someday to return to SUNY as students, it is necessary to note that there is no such evidence in the record. After they had filed their main brief in the Second Circuit, some plaintiffs sought to supplement the record pursuant to Fed R App P 10(e) with affidavits claiming, as they had not at any earlier point in the litigation, that there was

(Continued on next page.)

Finally, the Second Circuit upheld the District Court's refusal to permit plaintiffs to amend their complaint by adding current SUNY students as plaintiffs. The court validated "the reasons [for this refusal] stated in the thorough analysis of [the] district court in its opinion" (22a). According to the court below, "[t]he district court correctly concluded that once a case is moot, it is no longer justiciable in federal court and must be dismissed," and cannot be kept alive artificially by means of a transfusion of new plaintiffs (22a).

REASONS FOR DENYING THE WRIT

I. The decision below creates no "conflicts" or "confusion" with respect to the mootness doctrine.

Relying on well-established legal principles, the courts below recognized the inescapable fact that, once plaintiffs departed SUNY, their case became moot. Article III, § 2, cl 1 of the Constitution limits the federal "judicial power" to "Cases" and "Controversies." When there is no case or controversy, an action is moot and a federal court lacks subject matter jurisdiction over it. The "confusion" and "conflicts" plaintiffs purport to detect in this area of law, and on which they premise their petition for certiorari, are simply nonexistent.

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[3](Continued from previous page.)
a reasonable probability they would return to SUNY as students. As Judge Mahoney explained, although he granted this motion "prior to oral argument, subject to reconsideration by the panel, as a matter of administrative convenience," the motion was ultimately denied by the panel, for "this evidence is not a proper supplement to the record as contemplated by Fed R App P 10(e)" (21a). "In any event," the court below noted, "consideration of the affidavits would not affect the outcome of this case" (21a).

Plaintiffs' central argument (Petition, pp 8-16) is based on nothing more than a truncated, selective, and therefore inaccurate reading of this Court's decisions. Thus, according to plaintiffs, the question of whether the mootness doctrine is rooted in the constitutional "cases and controversies" requirement or in prudential considerations remains "unresolved" and must now be addressed by this Court. Plaintiffs' sole basis for this contention is the case of *Honig v Doe,* 484 US 305, 317 (1988), in which a six-judge majority noted that "[u]nder Article III of the Constitution this Court may only adjudicate actual, ongoing controversies." Similarly, Justice Scalia, joined by Justice O'Connor in dissent, opined that the mootness doctrine is constitutionally based: "I cannot believe that it is only our prudence, and nothing inherent in the understood nature of 'The judicial Power,' [cit om] that restrains us from pronouncing judgment in a case that" has become moot. 484 US at 341 (Scalia, J. dissenting). Only Chief Justice Rehnquist, concurring in *Honig,* suggested that the mootness doctrine may be rooted in prudential rather than constitutional considerations. 484 US at 329-332 (Rehnquist, C.J., concurring).

As the court below recognized (14a-15a), any conceivable confusion as to the meaning of *Honig* and the constitutional source of the mootness doctrine was resolved by this Court's unanimous rulings in two subsequent cases, neither of which plaintiffs acknowledge. In *Lewis v Continental Bank Corp.,* 494 US 472 (1990), the Court, rejecting any suggestion that mootness is prudential, held squarely that mootness derives from "Article III of the Constitution." 494 US at 477. As the Court explained,

> Article III denies federal courts the power "to decide questions that cannot affect the rights of litigants in the case before them" [cit om], and confines them to

> resolving "'real and substantial controvers[ies] admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.'"

Id. (cit om). Similarly, in *U.S. Bancorp Mortgage Co. v Bonner Mall Partnership*, ___ US ___, 115 S Ct 386, 389, 130 L Ed 2d 233 (1994), the unanimous court alluded to "the limitations on the judicial power conferred by Article III" and added that federal courts lack authority "to decide the merits of a legal question not posed in an Article III case or controversy."

Thus, notwithstanding the law review articles plaintiffs cite in lieu of jurisprudence, there is no ongoing controversy as to the source of the mootness doctrine in Article III of the Constitution. There is disagreement among law professors, but not among courts. And this in turn means, as the court below recognized, that the absence of a live case or controversy absolutely deprives a federal court of subject matter jurisdiction, regardless of when the defense of mootness is raised by a party or indeed of whether the defense is raised at all.

Nor is there any question as to how the mootness doctrine applies either to this case or more generally to cases discussing what plaintiffs (Petition, p 18) call "the significance of a student plaintiff's graduation from a defendant institution." As the court below understood, it is entirely clear that a student plaintiff's departure, through graduation or otherwise, from a school with which he at one time had a live controversy moots the case. A plaintiff who ceases to be a student retains no personal stake

in the outcome of a suit challenging a school's treatment of its students, and may not maintain such a suit.

Thus, in *Board of School Commissioners of the City of Indianapolis v Jacobs,* 420 US 128 (1975), plaintiffs were students seeking to have certain regulations of the Board declared unconstitutional. By the time of oral argument, all the plaintiffs had graduated. To the Court, this made it "clear that a case or controversy no longer exists between the named plaintiffs and the petitioners with respect to the validity of the rules at issue," and the case was therefore moot. 420 US at 129. In other words, the Court subsequently observed, the plaintiffs in *Jacobs* "no longer possessed a personal stake in the outcome at the time the case reached this Court for review." *Franks v Bowman Transportation Co.,* 424 US 747, 754 n.6 (1976). Similarly, in *DeFunis v Odegaard,* 416 US 312 (1974), the plaintiff was shortly to graduate from the law school whose admissions policies originally prompted his suit. Since the plaintiff would therefore not "be affected by any view this Court might express on the merits of this controversy," the Court concluded that it could not "consistently with the limitations of Art. III of the Constitution, consider the substantive constitutional issues tendered by the parties." 416 US at 317, 319-20.

The cases of the courts of appeals, far from embodying the "conflicts" which according to plaintiffs require this Court's intervention in the present case, in fact follow from the decisions in *Jacobs* and *DeFunis.* Thus, there is no conflict in the decisions of the Second Circuit, which in similar circumstances has invariably reached the same conclusions it reached in the present case. *See, Cook v Colgate University,* 992 F2d 17, 19 (2d Cir 1993) (graduation of plaintiffs "before the district court's order can affect them" rendered case moot); *Alexander v Yale University,* 631 F2d 178, 184 (2d Cir 1980) (plaintiffs' gradua-

tion rendered challenge to university's policy moot, for "[n]one of [them] at present suffers from the alleged injury"). These decisions in turn comport with the decisions of other courts of appeals. *See, e.g., McFarlin v Newport Special Sch. Dist.*, 980 F2d 1208, 1210-11 (8th Cir 1992) (claim for reinstatement to basketball team rendered moot by graduation); *Ahmed v University of Toledo*, 822 F2d 26, 28 (6th Cir 1987) (action moot with respect to four named plaintiffs after one graduated and three dropped out); *Wilson v State of Nevada*, 666 F2d 378, 381-83 (9th Cir 1982) (graduation mooted claim); *Williams v Spencer*, 622 F2d 1200, 1204 (4th Cir 1980) (same); *Doe v Marshall*, 622 F2d 118, 119 (5th Cir 1980) (same); *Gomes v Rhode Island Interscholastic League*, 604 F2d 733, 736 (1st Cir 1979) (same).

Nor do the cases plaintiffs cite as creating "conflicts" with the decision below do anything of the sort. There is a well-established exception to the mootness doctrine for cases where "the following two circumstances [are] simultaneously present: '(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party would be subjected to the same action again.'" *Lewis*, 494 US at 481 (quoting *Murphy v Hunt*, 455 US 478, 482 (1982)). This exception fit the factual circumstances of *Jones v Illinois Dept. of Rehabilitation Services*, 689 F2d 724, 728 (7th Cir 1982) (case was capable of repetition as to plaintiff, whose return as graduate student to school from which he had graduated was reasonably probable).[4] As was obvious to the courts below, a

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[4]To the extent that *Bender v Williamsport Area School District*, 741 F2d 538, 542 n 4 (3d Cir 1984), *vacated*, 475 US 534 (1986), may have avoided mootness through the Third Circuit's recourse to the possibility that the

(Continued on next page.)

bare claim that plaintiffs might someday return to SUNY for further education after having made no effort to do so 5 1/2 (now 7) years since their last affiliation with the university -- even if such a claim had been properly before the court, rather than asserted untimely on the eve of oral argument via a motion to supplement the record on appeal -- did not create the requisite reasonable expectation that these plaintiffs would again be subject to the university policy of which they complained while students.

The supposed "conflict" between circuits upon which plaintiffs principally base their present petition requires that they boldly disavow their words to this Court in 1988. Plaintiffs at that time aggressively characterized this case as involving only the rights of students to host or attend presentations, not the separate rights of non-student invitees in connection with the same presentations. Thus, they told this Court, "[a]t all times throughout the litigation, the only issue raised was that of the constitutional rights of the students, as invitors, to listen to speech which they wanted to hear" (Respondents' Brief on Writ of Certiorari, p 3). In other words, plaintiffs said, they brought this action "because it is their free speech rights, *not the rights*

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[4](Continued from previous page.)
controversy might be repeated with other parties than the plaintiffs therein, it was plainly wrong, for this Court has made clear that the exception to mootness must apply to "the same complaining party." *Lewis*, 494 US at 481. There is no reason to review the case at bar simply to demonstrate that the court below employed the proper standard. In any event, the Third Circuit's judgment in *Bender* was vacated on the ground that the appellant in the circuit court lacked standing, leaving the Third Circuit both "without jurisdiction to hear the appeal" and "without authority to decide the merits." 475 US at 549. Accordingly, the Third Circuit's decision in that case has no precedential value and cannot "conflict" with any other decision of any court.

of their [non-student] invitees, that have been infringed" (Brief for Respondents on the Merits, p 1) (emphasis supplied).

Now, seven years later, the same parties in the same case purport to detect a conflict between the decision below and *Washegesic v Bloomingdale Public Schools,* 33 F2d 679 (6th Cir 1994), *cert. denied,* ___ US ___, 115 S Ct 1822, ___ L Ed 2d ___ (1995). In *Washegesic,* the Sixth Circuit concluded that a former high school student who objected on Establishment Clause grounds to display of a portrait of Jesus Christ in a school hallway retained the capacity to sue the school district despite having graduated, for "the portrait of Jesus affects students and non-students alike" and the plaintiff "still visits the school and will confront the portrait whenever he is in the hall." 33 F3d at 681. As the court below recognized (22a n 5), *Washegesic* is distinguishable, for in the present case both plaintiffs' standing and their substantive claims have been predicated throughout solely on their status as SUNY students, not on their asserted role as non-student visitors to SUNY campuses. Plaintiffs can certainly now bring an action, of course involving a wholly different set of First Amendment issues, based on their status as visitors. But that is not the case they actually brought. Once they lost their status as students, that case became moot.

Nor are there judicial conflicts or uncertainties concerning what plaintiffs call (Petition, p 21) "the representative action exception to the doctrine of mootness." As plaintiffs evidently conceive of this "exception," it is a class action manqué, permitting a plaintiff to forego all the procedural requirements of Fed R Civ P 23, while still forestalling mootness when the named plaintiff ceases to have a stake in the outcome of the case. According to plaintiffs (Petition, p 25), whenever "leaders in student government" sue their schools, they are representing

all student bodies present and future, even if they do not bother to mention this fact to the courts.[5] Nothing this Court has ever said authorizes such an action, which of course would render the class action procedures established by the Federal Rules entirely superfluous. *See, Jacobs,* 420 US at 130 (dismissing case brought on "behalf of all high school students attending Indianapolis public schools" because class was never properly defined or certified). Indeed, in *Pasedena City Bd. of Educ. v Spangler,* 427 US 424 (1976), the original student plaintiffs had graduated. Plaintiffs' counsel suggested that the case be regarded as a *de facto* class action. This, said the Court,

> overlook[s] the fact that the named parties whom counsel originally undertook to represent in this litigation no longer have any stake in its outcome. As to them the case is clearly moot. And while counsel

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[5]Even on their own terms, plaintiffs are mistaken, for by their accounts they were suing on their own behalf. Stephanie Vaiano "felt that the [regulation] was an infringement on my rights" (234). Edward Detweiler joined the case because the regulation "infringes on my right of speech" (262). James Cullen "became very interested in the case because of th[e] infringement upon my rights" (263). Steven Gawley "decided before [he] became a plaintiff" that "this was a right that I would be interested in having" (252). Jeffrey Zellan "simply felt that I should be able to invite guests that I choose to invite" (270). Philip Botwinik felt that "the right to be able to do whatever I want within my own room * * * is very important" (264). And Botwinik's additional concern with the "constitutional rights of students" is insufficient under any circumstances to mark the suit as brought in a representational capacity, even if there were any reason to imagine Botwinik was empowered to do so. He could not have been, for he was just a man who "was very active in the student government" (264). Whatever this may mean, it is not enough to entitle him to represent all SUNY students, present and future.

> may wish to represent a class of unnamed individuals still attending the Pasedena public schools who do have some substantial interest in the outcome of this litigation, there has been no certification of any such class which is or was represented by a named party to this litigation.

427 US at 430.

If the expedient of a "representative action" were ever appropriate, *Spangler* would have been the place to employ it. Instead, this Court rejected such a device, in terms unmistakably applicable to the case at bar. As in *Spangler*, the present plaintiffs no longer have a stake in the outcome of the litigation. It is their counsel who "wish to represent" others with an assertedly "substantial interest in the outcome." But as in *Spangler*, counsel's search for clients is not a sufficient reason to prolong, in the form of a "representative action," a moot case that has not been certified or even brought as a class action.

Moreover, even if such a "representative" action is viable under some circumstances, *cf. Trachtman v Anker*, 563 F2d 512 (2d Cir 1977), *cert denied*, 435 US 925 (1978), there is no question that, as the court below recognized, plaintiffs cannot keep the representative nature of the action to themselves until their case becomes moot and it suits them to reveal it. At no point before 1989 did plaintiffs, either in their pleadings or anywhere else, suggest that they were suing on anyone's behalf but their own. Indeed, the very parties whom plaintiffs claim to have represented -- the Student Associations at SUNY-Albany and SUNY-Cortland -- filed *amicus* briefs on the merits in the Second Circuit in 1988, proving rather definitively that these student associations did not view plaintiffs as their proxies.

Thus, the supposed "conflicts" and "confusions" which according to plaintiffs justify a writ of certiorari in this case are completely nonexistent. There is no doubt that the mootness doctrine is grounded in Article III of the Constitution, that the doctrine applies to foreclose litigation between students and their school after the students have departed the institution, that the exception to the mootness doctrine for actions that are capable of repetition yet typically evade review does not apply to students who have had no affiliation with their schools for many years and demonstrate no reasonable likelihood of returning, and that a plaintiff cannot avoid mootness by eschewing a class action but asserting, in the face of a challenge for mootness, that his case has been maintained *sub silentio* as a "representative action" on behalf of others. The decisions of the courts below did no more then apply these well-established principles to the case at bar. There is no need for this Court to grant plaintiffs' petition merely to restate these principles.

II. The Mootness Doctrine was properly applied to this case.

Eschewing the necessary rigorous demonstration of circumstances justifying a grant of their petition, plaintiffs instead devote a substantial portion of their petition (pp 22-29) to elaborate special pleading, contending that the mootness doctrine should not have been applied to their demonstrably moot case. All they accomplish with this special pleading is a persuasive showing that the courts below were correct: this case presents a textbook example of mootness, and any result other than dismissal on mootness grounds would have worked the "inequities" of which plaintiffs complain.

Plaintiffs misunderstand the doctrine of mootness, imagining it can be ignored by federal courts that find it convenient to do so. As demonstrated in the preceding section, that is simply

untrue: a court lacks jurisdiction over a case that becomes moot, regardless of the stage of the litigation at which mootness arises. Thus, as a unanimous Court put it in *Lewis v Continental Bank Corp.*, the "case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate." 494 US at 478. If plaintiffs were correct in arguing (Petition, pp 23-24) that, once having accepted jurisdiction over a case, as this Court did the present case in 1989, the case can never have become moot, the result in *Rhodes v Stewart,* 488 US 1 (1988), could not have occurred. Although the Court in *Rhodes* did not realize the fact when it first remanded the case in 1983, it was moot at that time. 488 US at 3. In 1988, reversing the District Court's opinion on remand that the plaintiffs were prevailing parties, the Court noted that "[t]he case was moot before judgment issued, and the judgment therefore afforded the plaintiffs no relief whatsoever." *Id.* In other words, dismissal after remand is exactly what should occur in a moot case that has been heard by this Court. Indeed, even when this Court has granted a petition for certiorari and "received briefing on the merits," a turn of events that renders further proceedings academic "moot[s] the case" and deprives the Court of jurisdiction to decide it on its merits. *U.S. Bancorp Mortgage Co.,* 115 S Ct at 389 (case rendered moot by settlement agreement).

Plaintiffs further betray their misunderstanding of the mootness doctrine in their contention (Petition, pp 24-25) that the case cannot be moot because SUNY was "on notice of the facts supporting its mootness claim" before this Court's decision in 1989 and thus asserted the claim "belated[ly]" after remand to the District Court. As a simple matter of fact, the contention is false: as demonstrated in the record, to the best of defendants' knowledge the case was still viable in late 1988 and early 1989; when, after remand, defendants learned of the case's mootness, they brought it promptly to the District Court's attention. But

quite apart from this, plaintiffs overlook both the nature of mootness as a legal principle and the duties that the possibility of mootness imposes on all parties to a litigation. Because mootness is, as discussed above, a jurisdictional prerequisite, it cannot be waived or abandoned by a party. Indeed, it can be invoked *sua sponte* by a court even if the parties overlook it. Thus, there is no such thing as a "belated" claim of mootness. If a case is moot -- even if it has been sc for some time before the parties or the court realizes it -- it is over.

Moreover, as this Court has made clear, the obligation to apprise a court of the mootness of a case rests on all parties. Thus, for example, "when a development after this Court grants certiorari or notes probable jurisdiction could have the effect of depriving the Court of jurisdiction due to the absence of a continuing case or controversy, that development should be called to the attention of the Court *without delay.*" *Board of License Commissioners v Pastore,* 469 US 238, 240 (1985) (emphasis in original). Plaintiffs (unlike defendants) presumably knew that they were no longer affiliated with SUNY as of September 1988. By their own reasoning, it is as easy to argue that they wrongfully suppressed knowledge of the case's mootness as that SUNY asserted the defense "belatedly." But no such argument is necessary, for the point of the mootness doctrine is to prevent courts from doing needless work -- an object which does not depend on a party's assertion, "timely" or otherwise, of a mootness claim.

Nor, having failed to employ "[t]wo simply procedural expedients to avoid mootness" (Petition, pp 25-27) when they might have kept this action alive, can plaintiffs now request this Court to exercise these procedures retroactively to resuscitate their long-dead case. As noted above, having eschewed a class action lawsuit and having failed at any point before the case

became moot to indicate that they were representing anyone's interests but their own, plaintiffs cannot now rescue their case with the *deus ex machina* of a "representative capacity" suit. Similarly, having failed to amend their complaint to add new parties with an ongoing stake in the litigation at a time while the case was still viable, plaintiffs cannot now correct this shortcoming. Plaintiffs' counsel understood well both the dangers of mootness in non-class actions involving students and the means by which these pitfalls could be avoided. In 1985, before trial, they sought and were allowed to amend the complaint to add many of the present plaintiffs "as student plaintiffs so that they may preserve and continue to litigate the student-related issues already raised in this action." Their unaccountable failure to seek any further such amendment has rendered this case moot for roughly half its existence.

Nor, as the courts below understood, are the procedures on which plaintiffs would rely to rescue their case from mootness (Petition, p 25) at all suited to belated amendment of a complaint. Fed R Civ P 21 addresses only "Misjoinder and Non-joinder of Parties." As the Second Circuit has noted, this Rule "was adopted to obviate the harsh common law adherence to the technical rules of joinder [cit om], and not in order to deal with problems of defective federal jurisdiction." *Kerr v Compagnie De Ultramar,* 250 F2d 860, 864 (2d Cir 1958). The rule cannot be used to obtain federal jurisdiction by substitution of parties where none otherwise exists. *See, e.g., Graves v Walton County Bd. of Educ.,* 686 F2d 1135, 1138 (5th Cir 1982) (in absence of a class action, a case in which student plaintiffs have all graduated is moot and presents "no viable action" to which proposed new plaintiffs can be added under Rule 21); *Field v Volkswagenwerk AG,* 626 F2d 293, 306 (3d Cir 1980) (Rule 21 cannot be employed "to substitute a diverse claimant for a non-diverse plaintiff" and thus obtain federal jurisdiction,

for "substitution of parties" is "simply not within the scope of" the Rule).

Similarly, both courts below understood that Fed R Civ P 15(a), which permits only "a party" to "amend a party's pleading," cannot be used to amend a complaint in a moot case. Since the absence of a continuing case or controversy means that a plaintiff lacks standing to invoke a federal court's jurisdiction, *see, Princeton University v Schmid,* 455 US 100, 103 (1982), then once a case has been recognized as moot, it simply does not exist any longer, and its plaintiffs may not keep it alive by substituting new plaintiffs for themselves pursuant to Fed R Civ P 15(a). *See, e.g., Summit Office Park v United States Steel Corp.,* 639 F2d 1278, 1282 (5th Cir 1981) (since original plaintiff's case was moot and thus "there was no plaintiff before the court with a valid cause of action, there was no proper party available to amend the complaint"). Nor, more generally, can Rule 15(a) be used to permit a plaintiff over whose case the District Court lacks subject matter jurisdiction to amend its complaint pursuant to Rule 15(a) to substitute a new party with a viable suit. *See, e.g., Pressroom Unions-Printers League Income Security Fund v Continental Assurance Co.,* 700 F2d 889, 893 (2d Cir), *cert denied,* 464 US 845 (1983) (although a plaintiff may "remedy inadequate jurisdictional allegations," it may not "substitute a new action over which there is jurisdiction for one where it did not exist"). The "procedural expedient" of amendment of a still-viable complaint to add new parties was readily available to and indeed once employed by plaintiffs during the first six years of this litigation. Their inexplicable failure to repeat this well-established and clearly-available device is no reason for the court to intervene now in order to consider the application of inappropriate procedural mechanisms to revive this long-moot action.

Nor, finally, is this Court's review necessary in order to vindicate the right of counsel for the "prevailing party" in cases brought pursuant to 42 USC § 1983 to recover attorney's fees under 42 USC § 1988. Plaintiffs argue (Petition, pp 7-8, 27-28) that certiorari should be granted in order to avoid the supposedly "chilling effect" that a dismissal on the ground of mootness will have "on the private bar's willingness to get involved in such cases." In plaintiff's view, 42 USC § 1988 is the Private Attorneys' Relief Act: in § 1983 cases, the private bar's interest in attorney's fees is so great that an attorney may recover such fees even when his case becomes moot. There is, however, not one shred of legislative history suggesting that Congress, in enacting § 1988, intended that public funds be spent on attorney's fees paid to the private bar in cases that cease to be viable because plaintiffs no longer have a stake in their outcome. Indeed, this Court has commented definitively on the fact that counsel's desire for attorney's fees cannot keep a moot case alive, noting that an "interest in attorney's fees is, of course, insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim." *Lewis,* 494 US at 480.

While valorizing their own quest for attorney's fees, which has kept their obviously moot case before the courts for the past six years, plaintiffs disparage defendants' efforts to avoid liability for attorney's fees by calling the mootness of the action to the courts' attention. There is, however, nothing either reprehensible or avoidable about the fact that 42 USC § 1988, by making attorney's fees available to prevailing parties, affects the incentives for both sides in civil rights litigation. Plaintiffs purport to be troubled by the fact that this case, which since 1989 has lacked any plaintiff with a stake in its outcome, has survived like a tenacious weed solely on the strength of the

quest of plaintiffs' counsel for attorney's fees.[6] But it is difficult to understand why, if (as plaintiffs claim) "SUNY's real motive" in calling the mootness of the case to the courts' attention is avoidance of liability for attorney's fees, the real motive of plaintiffs or their counsel in prolonging a case that has been moot for more than six years is not equally and solely the recovery of counsel fees. It is certainly not defendants who have "squandered" "judicial resources" by keeping this case alive. The current plaintiffs, having left SUNY long ago, have no stake in the outcome of this litigation. As the court below noted, their successors as SUNY students can count on swift resolution of their claims should they ever trouble to commence a new action. Indeed, if plaintiffs' presumably-available student successors had simply commenced a new action as soon as this case became moot, that action would undoubtedly have been resolved on its merits long ago.

This case, at all times since its remand to the District Court in 1989, has entailed no more than a routine application of the well-established principles of the mootness doctrine. The application of these principles may indeed foreclose any claim by plaintiff's counsel for attorney's fees, but such foreclosure is itself the unquestionable consequence of the mootness of this case. A quest for attorney's fees under 42 USC § 1988, without more, is insufficient to keep a moot case alive. There is no need for this Court to grant review merely to restate this unexceptionable conclusion.

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[6]Plaintiffs (Petition, pp 28-29 n 14) quote a colloquy to this effect during oral argument of the case before the Second Circuit between counsel for defendants and "Judge Winter." Judge Ralph K. Winter, however, was not a member of the Second Circuit panel that held unanimously in defendants' favor. Plaintiffs presumably mean to refer to Judge John M. Walker, Jr.

CONCLUSION

The petition for a writ of certiorari should be denied.

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June 1, 1995

Respectfully submitted,

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